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Right to Counsel: People v. Rosen

N.Y. CONST. art. I, § 6:

In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions . . . .

U.S. CONST. amend VI:

In all criminal prosecutions, the accused shall enjoy the right . . . to have Assistance of Counsel for his defence.

COURT OF APPEALS

People v. Rosen[1814]
(decided May 6, 1993)

Defendant claimed that his right to proceed pro se under the New York State Constitution[1815] was violated when the trial judge refused, without explanation, to allow him to attend sidebar conferences, despite specific requests.[1816] The New York Court of Appeals reversed the defendant's conviction and ordered a new trial, holding that defendant's right to self-representation had been violated by the arbitrary and categorical exclusion from sidebar conferences.[1817]

The record indicated that the defendant was indicted for a variety of charges, including "conspiracy, grand larceny and other felonies arising out of a complex scheme to defraud investors . . . ."[1818] The defendant's assigned counsel had sought

1814. 81 N.Y.2d 237, 613 N.E.2d 946, 597 N.Y.S.2d 914 (1993).

1815. N.Y. CONST. art. I, § 6. Section 6 provides in pertinent part: "In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him." *Id.*

1816. *Rosen*, 81 N.Y.2d at 242, 613 N.E.2d at 947, 597 N.Y.S.2d at 915.

1817. *Id.* at 246, 613 N.E.2d at 949, 597 N.Y.S.2d at 917.

1818. *Id.* at 241, 613 N.E.2d at 947, 597 N.Y.S.2d at 915.

a mistrial after the prosecution's first witness had been questioned by the court.[1819] The assigned counsel claimed that questions posed by the trial judge assisted the prosecution.[1820] In support of his motion for a mistrial, counsel argued that the court could not provide a fair trial, since it had "expressed an opinion regarding the defendant's guilt in an off-the-record discussion."[1821] Upon denial of this motion the court added, "[f]or that matter you told me you thought Mr. Rosen was guilty in our off the record conversation."[1822] The court also explained that it found it necessary to intercede because the defense counsel did not pose its questions correctly.[1823] Subsequently, the defendant's counsel made a motion for mistrial, stating that his client had lost confidence in his ability. Again, the motion was denied.[1824] Following the testimony of several additional witnesses for the people, the "defendant informed the court that he wished to represent himself for the remainder of the trial . . . ."[1825] After hearing the court's admonition concerning the dangers inherent in self-representation,[1826] and conferring

1819. *Id.*

1820. *Id.*

1821. *Id.*

1822. *Id.*

1823. *Id.*

1824. *Id.*

1825. *Id.* The defendant informed the court that, as a result of "numerous factual mistakes and inadequate cross-examination" by his counsel, he wished to represent himself. *Id.*; *see also* People v. Ferguson, 67 N.Y.2d 383, 390, 494 N.E.2d 77, 81, 502 N.Y.S.2d 972, 976 (1986) (reasoning that defendant who retains a lawyer gives up control of much of the case except for "certain fundamental decisions reserved to the client").

1826. *Rosen*, 81 N.Y.2d at 211, 613 N.E.2d at 947, 597 N.Y.S.2d at 915; *see generally* Powell v. Alabama, 287 U.S. 45, 68-69 (1932). In *Powell* the Court stated that:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both

with his counsel, the defendant insisted on proceeding as his own lawyer.[1827] Consequently, the court granted the defendant's request to proceed pro se and to have assigned counsel remain as "legal advisor."[1828]

The defendant's constitutional claim was based upon the absolute restriction by the trial judge that "the defendant would not be allowed to attend any sidebar conferences." Although defendant had taken control of his own defense and had specifically requested that he be allowed to be present at sidebar conferences, the trial court refused to allow his attendance.[1829] The trial court stated that "sidebar conferences did not include the defendant. Some [of the conferences] involved purely 'housekeeping' matters, others substantive issues, others were off the record. Some were held in the jury's presence, others not;

> the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Id.

1827. *Rosen*, 81 N.Y.2d at 241, 613 N.E.2d at 947, 597 N.Y.S.2d at 915.

1828. *Id.* at 241-42, 613 N.E.2d at 947, 597 N.Y.S.2d at 915.

1829. *Id.* at 242, 613 N.E.2d at 947, 597 N.Y.S.2d at 915.

> "[Counsel]: Yes, there is a matter that needs to be cleared up at this time. If Mr. Rosen plans on questioning as he does and if there is a sidebar, or if there is a sidebar which has occurred prior to his time, Mr. Rosen requests that he be allowed to attend the sidebar.
>
> "The Court: I won't be having sidebars with Mr. Rosen. If it is necessary I will excuse the jury. There will be no sidebars with Mr. Rosen."

Id. The prosecution in *Rosen* argued that "standby counsel's appearances at conferences reflected the 'division of labor' chosen by defendant, and that the trial court could not have known that defendant wished to participate." *Id.* at 245, 613 N.E.2d at 949, 597 N.Y.S.2d at 917. "[In light of the] record the [court] conclu[ded] . . . that the division of labor, at least in connection with sidebar conferences, was imposed, not chosen." *Id.* The people further contended that defendant's claim was not preserved. They faulted the defendant for not pursuing further his request to attend sidebars. *Id.* The court found, the "defendant's specific application and the court's equally specific ruling were sufficient to preserve the issue for appeal." *Id.*

some were initiated by the court, others by standby counsel."[1830] It was this arbitrary denial of any opportunity to attend sidebar conferences which violated the defendant's state constitutional right to self-representation.[1831]

In its decision, the court of appeals acknowledged that "[t]he right to appear pro se exists, in part, 'to affirm the dignity and autonomy of the accused.'"[1832] This court stated, "indisputably, a defense representative, acting as counsel, was entitled to attend sidebars."[1833]

1830. *Id.* at 242, 613 N.E.2d at 947, 597 N.Y.S.2d at 915.

1831. *Id.* at 241, 613 N.E.2d at 947, 597 N.Y.S.2d at 915. The defendant complained that

> off-the-record conferences were unfair because reports of the conferences were secondhand and 'diluted.' Defendant cited as an example a 12 to 15 minute sidebar that was summarized for him in two minutes . . . . [The] defendant recited his understanding of the court's previous ruling whereby defendant would 'not [be] attending bench conferences, and if necessary . . . you would have the jury leave; or if the jury wasn't here you would instead of having a bench conference, you would have it in open court and on the record' . . . .

Id. at 242, 613 N.E.2d at 947, 597 N.Y.S.2d at 915-16; *see also* McKaskle v. Wiggins, 465 U.S. 168, 177 n.8 (1983). In *McKaskle*, the United States Supreme Court found that "[s]ince the right of self representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to 'harmless error' analysis. The right is either respected or denied; its deprivation cannot be harmless." *Id.*

1832. *Id.* at 245, 613 N.E.2d at 949, 597 N.Y.S.2d at 917 (quoting *McKaskle*, 465 U.S. at 176-77); *see* People v. McIntyre 36 N.Y.2d 10, 17, 324 N.E.2d 322, 327, 364 N.Y.S.2d 837, 844. The court delineated provisions to be met in order to invoke the right to defend pro se: "(1) the request is unequivocal and timely asserted, (2) there has been a knowing and intelligent waiver of the right to counsel, and (3) the defendant had not engaged in conduct which would prevent the fair and orderly exposition of the issues." *Id.*; *see also* Maldonado v. Denno, 348 F.2d 12, 15 (2d Cir. 1965) ("[E]ven in cases where the accused is harming himself by insisting on conducting his own defense, respect for individual autonomy requires that he be allowed to go to jail under his own banner if he so desires and if he makes the choice 'with eyes open.'").

1833. *Rosen*, 81 N.Y.2d at 245, 613 N.E.2d at 949, 597 N.Y.S.2d at 917.

If a court, in its discretion, appoints standby counsel,[1834] such counsel must generally respect the preferences of the defendant.[1835] Such deference is based upon the objective of preserving the pro se defendant's control over his case and the perspective of the jury with regard to such control.[1836] However, counsel does not have to be excluded altogether, "especially when the participation is outside the presence of the jury or is with the defendant's express or tacit consent."[1837] The Supreme Court, in *McKaskle v. Wiggins*,[1838] reasoned that the participation of standby counsel without the defendant's consent poses a risk of "destroying the jury's perception that the defendant is representing himself."[1839]

Prior to this case, the New York courts had not resolved this precise issue. This is evidenced by the appellate court's decision which, while affirming the trial court's conviction, noted "the issue was not free from doubt."[1840] The right to proceed pro se

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1834. *See* People v. Mirenda, 57 N.Y.2d 261, 264, 442 N.E.2d 49, 50, 455 N.Y.S.2d 752, 753 (1982). The court of appeals held that "[a] criminal defendant has a constitutional right to be represented by counsel, or to proceed *pro se*. A defendant has no constitutional right, however, to the assistance of a lawyer while conducting a *pro se* defense." *Id.*

1835. *See* People v. Sawyer, 57 N.Y.2d 12, 22, 438 N.E.2d 1133, 1139, 453 N.Y.S.2d 418, 424 (1982) (recognizing that a judge may appoint standby counsel even over defendant's objection), *cert. denied*, 459 U.S. 1178 (1983); *see also* Faretta v. California, 422 U.S. 806, 835 n.46 (1975) ("[A] State may — even over objection by the accused — appoint a 'standby counsel' to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary.").

1836. *Rosen*, 81 N.Y.2d at 244, 613 N.E.2d at 949, 597 N.Y.S.2d at 917 (quoting *McKaskle*, 465 U.S. at 174). In *McKaskle*, the Supreme Court stated, "the pro se defendant must be allowed to control the organization and content of his defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and the jury at appropriate points in the trial." *McKaskle*, 465 U.S. at 174.

1837. *McKaskle*, 465 U.S. at 188.

1838. 465 U.S. 168 (1984).

1839. *Id.* at 178. The court stated that "the message conveyed by the defense may depend as much on the messenger as on the message itself." *Id.* at 179.

1840. People v. Rosen, 185 A.D.2d 128, 130, 585 N.Y.S.2d 742, 744 (1st Dep't 1992).

is clearly recognized in the New York State Constitution.[1841] Yet, the right to proceed pro se is subject to restrictions which promote the "orderly administration of justice."[1842]

In *Rosen*, the New York Court of Appeals found that the trial court's arbitrary barring of the defendant from sidebar conferences despite his specific request was inconsistent with the state constitutional provision securing the right to "appear and defend in person."[1843] However, the court recognized that the right to attend sidebars is no broader than the right to self-representation itself. It may, within an appropriate exercise of discretion, be denied or divested.[1844] In deciding, the court determined that the trial court advanced no reason for its refusal to permit the defendant to attend sidebars,[1845]and therefore, acted "arbitrarily" and "categorically," thus violating the protected state constitutional rights of the defendant.

The Supreme Court, in *Faretta v. California*,[1846] recognized the right of a defendant to conduct his own defense under the Sixth Amendment.[1847] In *McKaskle v. Wiggins*,[1848] the court resolved the issue of what role standby counsel, who is present at trial over defendant's objection, may play, so as not to be inconsistent with the defendant's *Faretta* rights.[1849] In *McKaskle*,

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1841. N.Y. CONST. art. I, § 6.

1842. *See also* People v. McIntyre, 36 N.Y.2d 10, 17, 325 N.E.2d 322, 327, 364 N.Y.S.2d 837, 844 (1974).

1843. *Rosen*, 81 N.Y.2d at 244, 613 N.E.2d at 948, 597 N.Y.S.2d at 916.

1844. *Id.* at 246, 613 N.E.2d at 949-50, 597 N.Y.S.2d at 917-18.

1845. *See* United States v. Mills 895 F.2d 897, 899 (2d Cir.), *cert. denied*, 495 U.S. 951 (1990). In *Mills*, the defendant's complaint on appeal argued that he should have been able to attend sidebar conferences and make legal arguments. *Id.* Although the complaint was valid, the court examined the entire record and did not find a basis for reversal. *Id.* In addition, the record did not reveal any indication that the defendant objected to being excluded. *Id.*

1846. 422 U.S. 806 (1974).

1847. *Id.* at 819. The *Faretta* Court stated that "[t]he Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense." *Id.*

1848. 465 U.S. 168 (1983).

1849. *Id.* at 177. The Court found that to be consistent with the *Faretta* right to proceed pro se, there must be limits on the extent of standby counsel's unsolicited participation. *Id.*

the issue concerned whether the defendant's rights were violated by the overzealous standby counsel.[1850] The Supreme Court reversed the court of appeals judgment, which completely limited the role of standby counsel when defendant had objected, and instead held counsel may not substantially interfere with any significant tactical decisions, or control the questioning of witnesses or speak instead of the defendant on any matter of importance.[1851]

Therefore, under the New York State Constitution and the Federal Constitution, a pro se defendant, who is actively asserting his right to self-representation, cannot be arbitrarily and categorically barred from participating in sidebar conferences.[1852]

People v. Ruff[1853]
(decided June 8, 1993)

Petitioner, convicted of murder in the first degree, claimed that his right to counsel under both the New York[1854] and

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1850. *Id.* at 176.

1851. *McKaskle*, 465 U.S. at 184. The Court made explicit what was already implied in *Faretta*:

> A defendant's Sixth Amendment rights are not violated when a trial judge appoints standby counsel — even over the defendant's objection — to relieve the judge of the need to explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles that stand in the way of the defendant's achievement of his own clearly indicated goals. Participation by counsel to steer a defendant through basic procedures of trial is permissible even in the unlikely event that it somewhat undermines the pro se defendant's appearance of control over his own defense.

Id.

1852. *Rosen*, 81 N.Y.2d at 245, 613 N.E.2d 946, 597 N.Y.S.2d 914; *see also Faretta*, 422 U.S. at 818-19 (finding that Sixth Amendment guarantees a criminal defendant the corollary right to dispense with counsel and to present his defense in the manner of his choosing).

1853. 81 N.Y.2d 330, 615 N.E.2d 611, 599 N.Y.S.2d 221 (1993).

1854. N.Y. CONST. art. I, § 6 provides in pertinent part: "In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel . . . ." *Id.*